REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 183/12

In the matter between:

NEHAWU obo LERUMO	**Applicant**
and	
P M VENTER N.O.	**First Respondent**
GPSSBC	**Second Respondent**
DEPARTMENT OF MINERALS AND ENERGY	**Third Respondent**

Heard: 14 October 2015
Delivered: 17 November 2015
Summary: Review of pre-dismissal arbitration award (LRA s 188A).

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant,[1] Mr Charlie Lerumo, is an admitted advocate who was employed by the Department of Minerals and Energy (the third respondent) as an assistant director: mineral law. The applicant and the Department agreed that 11 allegations of misconduct against him should be considered by an arbitrator of the General Public Service Sectoral Bargaining Council (the second respondent) in terms of section 188A of the Labour Relations Act.[2] The second respondent, Adv P M Venter, was appointed as arbitrator. He found that the applicant had committed serious misconduct. He had a dishonest and corrupt relationship with a Mr Mase of Sam Mase Consulting, an entity that applied for prospecting rights from the Department. He benefited from the relationship. He did not show any remorse. The arbitrator ruled that the applicant's services be terminated; and he recommended that the Department pursue criminal charges against him and Mase, and that his conduct be reported to the General Bar Council of South Africa and the Association of Advocates for the Northern Cape.

[2] The applicant seeks to have the award reviewed and set aside.

Preliminary issues

[3] The Department sought condonation for the late filing of its answering affidavit. I granted condonation on the day of the hearing, together with *ex tempore* reasons.

[4] The record was incomplete. The evidence of some witnesses was not transcribed. On 8 May 2014 I issued the following directive:

> "The parties and their legal representatives are directed to meet in Kimberley before 30 May 2014 to reconstruct the record. They must inform this court of the outcome (for attention of Steenkamp J) by no later than 6 June 2014."

[1] I refer to Mr Lerumo as "the applicant" or "the employee", although he was represented throughout by his trade union, NEHAWU. The union is cited as the applicant on behalf of Mr Lerumo.

[2] Act 66 of 1995 (the LRA).

That did not happen due to the unavailability of the various parties, their legal representatives and the arbitrator. On 23 June 2014 issued another directive for them to convene on 26 June 2014. They did so. On 8 July 2014 the arbitrator issued a "reconstruction ruling" stating that he was unable to reconstruct the missing parts of the record.

On 14 August 2014 I issued a third directive in these terms:

> "1. It appears from the ruling of the panellist, P M Venter, of 8 July 2014 under case number GPSSBC 1348-2011 that the record cannot be reconstructed.
>
> 2. The parties are directed to indicate by no later than 29 August 2014 whether they will consent to the following order:
>
> (a) The award of 25 January 2012 is reviewed and set aside.
>
> (b) The pre-dismissal arbitration is referred back to the GPSSBC for an arbitration de novo.
>
> (c) The question of the employee's remuneration for the period from 25 January 2012 to the date of the determination of the arbitration is to be determined by the arbitrator.
>
> 3. Should the parties not consent to such an order, the review application will be set down on the opposed roll in the absence of a full record. Either party's failure to consent to the proposed order will be a relevant consideration in a costs order."

[5] The parties could not agree. The matter was set down on the opposed motion roll. Mr *Lobi* argued that the award should be reviewed and remitted simply because the full record could not be reconstructed. Mr *Coetzee* disagreed.

[6] As the arbitrator pointed out in his "reconstruction ruling", the evidence of three witnesses (out of seven) was not transcribed. But, he says, "I have read my award and my summary of their evidence seems to be accurate as far as I can recall the facts." And indeed, neither legal representative could point to any instances where the facts had not been correctly summarised. The award is a comprehensive one comprising 26 typewritten pages and summarising the evidence of each of the witnesses. I was satisfied that I could, given that summary and the transcript of the

evidence of the other witnesses, decide whether the conclusion reached by the arbitrator fell within a band of reasonable decisions.

The background facts and the award

[7] The Department led evidence on 11 charges of misconduct. The arbitrator found the employee guilty on six and not guilty on five of those charges. The employee only challenges the arbitrator's findings in respect of those where he found that the employee did commit the misconduct complained of. I will deal with each of those in turn.

Charge 1: allegation of racism

[8] It was alleged that the employee "badmouthed" his superior, Mr Pieter Swart – the regional manager of the Northern Cape – when he told Mr Mase that Swart is a racist and arrogant towards black small-scale miners.

[9] The arbitrator correctly found that Swart's own evidence relating to this incident was hearsay. So was that of the deputy director in the audit department, Mr Miyen. The evidence of Mr Mase was therefore crucial. At the commencement of his evidence he told the arbitrator that he did not intend to proceed with the case against the applicant. However, he did depose to three affidavits and confirmed that he did so voluntarily and under oath. The arbitrator therefore gave the applicant an opportunity to cross-examine him, but the applicant and his union representative chose not to cross-examine him on crucial aspects. Mase's evidence on affidavit was therefore largely unopposed.

[10] The arbitrator found that Mase's evidence was clear and he explained by way of affidavit that the employee had badmouthed Mr Swart and that he had accused Swart of racism. And the other witness, Ms Mzambo, had no knowledge of the incidents; but she was not present at all material times. The arbitrator found the employee guilty on that charge.

Charge 4: accepting cash to influence processing of applications for prospecting rights

[11] It was alleged that the employee accepted cash in the amount of R 6 000 for the purpose of inducing or influencing the speedy processing of applications for prospecting rights submitted by Sam Mase Consulting. Mase's evidence was clear and uncontested. He admitted giving the money to the employee, who merely denied the allegation. He also admitted to having been involved in an "unlawful relationship" with the employee by giving him cash in return for fast tracking applications for prospecting permits. The arbitrator found that the employee had committed the misconduct.

Charge 6: conflict of interest

[12] It was alleged that the employee committed misconduct by acting in conflict of interest when he travelled to Witbank with members of Sam Mase Consulting to consult with Mr Dan Ferreira, a geologist, concerning prospecting rights for Royal Chaka Mining. Mr Mase's evidence in this regard was clear and undisputed. The arbitrator found that it was abundantly clear that the employee demonstrated some interest in the matter and that he acted in conflict with his official duties. He found him guilty on charge 6.

Charges 8 and 9: disclosing legally privileged information

[13] It was alleged that the employee disclosed legally privileged information when he made available sketch plans of Merero Mining to Royal Chaka Mining for the application of prospecting rights of two pieces of land, viz Lynedoch 432 farm and Cowley 457 Farm.

[14] The arbitrator found that the evidence of Mr Miyen and the accompanying documents are clear. The sketch plans for the farms were identical and this was no coincidence. They were clearly copied by Royal Chaka Mining and the only inference to draw from the evidence was that the employee assisted Royal Chaka Mining in this regard. The arbitrator found him guilty on these two charges.

Charge 11: prejudicing the administration of the Department

[15] It was alleged that the employee intentionally prejudiced the administration or efficiency of the Department when he processed applications for prospecting rights of Royal Chaka Mining by giving it preference over Merero Mining.

[16] The arbitrator found in evidence that the employee had travelled to Witbank and disclosed privilege information to Royal Chaka Mining. He was also instrumental in the drafting of sketch plans for Royal Chaka Mining while Merero's application for prospecting rights was pending. He clearly gave preference to Royal Chaka and prejudiced the administration, discipline and efficiency of the Department in so doing.

The sanction

[17] The arbitrator noted the Department's argument that the trust relationship had broken down irretrievably. The employee's conduct brought the name of the Department into disrepute. He noted that racial harmony in the workplace must be of paramount importance to employer and employees alike. Just as racist behaviour needs to be rooted out, allowing employees to willingly accuse fellow employees of being racist must be addressed if those allegations are baseless and made without reasonable cause. The arbitrator referred to *SACWU v NCP Chlorchem (Pty) Ltd*[3] where the Labour Court held that a black employee who, without justification, accused a white colleague of being racist was found to have been no less guilty of racism than a person using a racist expression. He also took into account that the employee did not show any remorse despite the evidence against him.

[18] The arbitrator further took into account that the trust relationship between the employee and the Department was irreparably broken as his conduct with regard to Mase amounted to corruption. He was entrusted with the duties of processing applications for prospecting and mining rights, but he acted dishonestly and abused his position within the department.

[3] [2007] ZALC 120.

[19] The employee presented no mitigating factors despite being requested to do so. Neither did he submit closing arguments. The arbitrator nevertheless considered that he is a first offender and that dismissal should normally be applied progressively. On the other hand, the employee had committed serious misconduct. He had a dishonest and corrupt relationship with Mase and he clearly benefited from the relationship. "His action is an exact example of the type of conduct that the public service should have a zero tolerance stance against. He misused his position and favoured a certain entity in exchange for financial gain. He also uttered racial remarks towards the regional manager, a charge which is also of a serious nature." The arbitrator also considered that the employee is an admitted advocate. "This simply means that he should act and behave like a fit and proper person to be called an advocate. He should also demonstrate a higher degree of ethical behaviour as another employee [*sic*] and has taken an oath in the High Court."

[20] Taking all these factors into account, the arbitrator found that the employee's services should be terminated.

Review grounds

[21] The applicant did not clearly articulate any review grounds in his founding and supplementary affidavits. He alleged in broad terms that the arbitrator's determination and assessment of the evidence was "grossly irregular"; that he failed to properly discharge his duties; and that he did not act as a reasonable decision-maker. He also alleged that the arbitrator exceeded his powers in recommending that the Department pursue criminal charges against him and Mase, and that his conduct be reported to the General Bar Council of South Africa and the Association of Advocates for the Northern Cape.

[22] The applicant did not, in his supplementary affidavit, complain that the absence of a full transcript deprived him of setting out his review grounds fully. That is a similar situation to the one that pertained in the recent case of *Moyo*[4] where the Court pointed out that the review application was

[4] *Moyo v CCMA* [2015] ZALCJHB 111 (26 March 2015) paras [26] – [27].

dependent on the record, but the applicant made no submissions with regard to the record. The Court held that the review application was defective and unsubstantiated, but there was no good reason to give the applicant a further chance to rectify it. She dismissed the review application for that reason, and the reason that the applicant did not set out any clear sustainable grounds of review in his application.

[23] In his heads of argument – delivered after those of the Department – Mr *Lobi* simply stated that "the applicant holds the view that his dismissal was unjust and should be reversed". It need hardly be stated that the applicant's view in this regard is irrelevant to the test for review. The test is, quite simply, that set out in *Sidumo*[5] and in *Herholdt*.[6] In short, was the arbitrator's finding one that a reasonable arbitrator could reach?

[24] Mr *Lobi* addressed no other review grounds in his heads of argument, other than the fact that the transcript is incomplete. That was not pleaded in the applicant's supplementary affidavit. In oral argument Mr *Lobi* contended, at first, that the arbitrator had disregarded the evidence of Ms Mzambo – a ground that was foreshadowed in the applicant's supplementary affidavit. After the Court had pointed him to the relevant parts of the transcript in which her evidence was recorded, the part of the award where the arbitrator summarised it, and debated it with him, he abandoned that ground of review.

[25] The rest of Mr *Lobi*'s argument consisted, in essence, of re-arguing the merits of the employee's case. He could not point to any reviewable irregularity in the conduct of the proceedings or in the conclusion that the arbitrator reached, given the evidence before him.

Evaluation / Analysis

[26] There is nothing unreasonable about the arbitrator's award. He carefully considered the evidence before him. He reasonably considered the evidence of Mr Mase, albeit on affidavit. He gave the employee and his representative the opportunity to cross-examine Mase and the

[5] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

[6] *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

Department's other witnesses. There was a fair trial of the issues. He understood the enquiry before him. He reasonably concluded that the employee had committed gross misconduct of a dishonest nature. He took into account the relevant mitigating and aggravating circumstances before deciding on sanction. His conclusion was entirely reasonable. The award is not open to review.

Costs

[27] The applicant has been unsuccessful. Both parties asked for costs to follow the result. I see no reason in law or fairness to differ with them.

[28] The applicant did not paginate and index the court file in accordance with rule 22B and clause 11.5 of the Practice Manual that has been in existence since April 2013. Neither did he deliver a practice note in accordance with clause 11.8 of the Practice Manual. His heads of argument were delivered late, and in fact only after the Department had delivered its heads of argument, despite the fact that he is *dominus litis.* He is an advocate of the High Court and he is legally represented. If the applicant does not file a practice note, clause 11.8.5 of the Practice Manual provides that the respondent may do so and seek a punitive costs order *de bonis propriis* against the applicant's attorneys. And with regard to pagination, indexing and binding of the pleadings, clause 11.5.9 of the Practice Manual provides:

> "Should the applicant not have complied with these provisions this shall not be a basis for any other party seeking postponement of the matter, and the presiding judge, on the day on which the matter is heard, may make any order the judge deems appropriate as to the conduct of the matter, which may include any order as to costs, including depriving applicant of any costs in the matter or any order of costs *de bonis propriis*.

[29] I have considered ordering costs *de bonis propriis* against the applicant's attorney for his failure to adhere to the provisions of the court rules and the practice manual. But as I have noted, the applicant is an advocate of the High Court. He should also have ensured that his legal representative does the right thing. Insofar as his attorney did not act on his instructions, I leave it to them to decide whether Mr *Lobi* is entitled to recover his full fee

from the applicant; but I shall go no further than to make a party and party costs order.

Order

The application for review is dismissed with costs.

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Steenkamp J

APPEARANCES

APPLICANT:	L Lobi of Lulama Lobi Inc, Kimberley
THIRD RESPONDENT:	A Coetzee Instructed by the State Attorney, Cape Town.